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IN THE

Supreme Court of the United States

OCTOBER TERM 1978

NO. 78-

Robert D. Holleman,
Petitioner

V.

United States of America,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. 78-

ROBERT D. HOLLEMAN,

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UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE
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FOR THE FOURTH CIRCUIT

This petition for a writ of certiorari seeks review of a decision of the Court of Appeals for the Fourth Circuit, which affirmed petitioner's conviction in the District Court for the Middle District of North Carolina.

OPINIONS BELOW

A panel of the Court of Appeals for the Fourth Circuit heard argument May 4, 1978 on the appeals of the petitioner and his four codefendants. On January 30, 1979, the Court rendered an unpublished per curiam opinion affirming the convictions. A petition for rehearing and suggestion for rehearing en banc was denied on March 14, 1979 by an order

which amended one sentence of the original opinion. The appellate opinion and the order denying the petition for rehearing are reproduced in the Appendix to this Petition at A-1 and A-7. The District Court did not issue an opinion.

JURISDICTION

The decision of the panel of the Court of Appeals was entered on January 30, 1979. The decision denying the petition for rehearing and the suggestion for rehearing en banc was entered on March 14, 1979. This petition is timely filed within 30 days of the denial of rehearing. 28 U.S.C. § 1254 (1)(1976) confers on this Court jurisdiction to review this case.

QUESTIONS PRESENTED

1. Is it a criminal misapplication of the funds of a lending institution to make a real estate loan to a named borrower, with the intention that the proceeds be used by another person, who has provided the collateral?

2. Was it error to allow the jury to impute to the petitioner the knowledge and intent of clients for whom he performed routine legal services in connection with a loan transaction?

3. In view of petitioner's relatively minor role in the transactions on which the indictment was based, the massive pretrial publicity that had occurred, and the additional indictment of his four codefendants shortly before

trial began, should petitioner's continuing motion for severance have been granted?

4. In view of petitioner's objections, did the court below err in failing to distinquish between the theory on which the Grand Jury indicted petitioner and the theory on which the government sought to convict him?

5. In view of the overwhelming pretrial publicity, did the court below err in denying petitioner's request that prospective jurors be examined as to their competency outside the presence of the jury panel?

CONSTITUTIONAL PROVISIONS AND

STATUTES INVOLVED

United States Constitution

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

18 U.S.C. § 657 (1976):

Whoever, being an officer, agent or employee of or connected in any capacity with the Reconstruction Finance Corporation, Federal Deposit Insurance Corporation, Home Owners' Loan Corporation, Farm Credit Administration, Department of Housing and Urban Development, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, or any land bank, intermediate credit bank, bank for cooperatives or any lending, mortgage, insurance, credit or savings and loan corporation or association authorized or acting under the laws of the United States or any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, or any small business investment company, and whoever, being a receiver of any such institution, or agent or employee of the receiver, embezzles, abstracts, purloins or willfully misapplies any moneys, funds, credits, securities or other things of value belonging to such institution, or pledged or otherwise intrusted to its care, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount or value embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

* * ** * * * * * * * * *

18 U.S.C. § 2 (1976); 18 U.S.C. § 371 (1976); and 18 U.S.C. § 1006 (1976) are reproduced in the Appendix hereto at A-10.

STATEMENT OF THE CASE

On September 6, 1977, the petitioner and four codefendants were variously charged in an eighteen-count indictment. Petitioner and codefendant Winders are attorneys; codefendants Harris and Edwards were officers of a federally-chartered savings and loan association; and codefendant Roberts was a real estate developer.

Count One alleged that all five defendants had conspired to misapply funds of a federally-insured savings and loan association and to cause false entries and statements to be made in the records and reports of that association. Petitioner was jointly charged in five substantive counts of misapplication in violation of 18 U.S.C. § 657; he was jointly charged in Count Eighteen with falsely certifying a land title in violation of 18 U.S.C. § 1006.

Petitioner moved unsuccessfully for severance from his codefendants on grounds that a joint trial would prejudice his defense. He renewed this motion when his codefendants were indicted on other savings-and-loan related charges a few days before trial. The trial judge treated petitioner's motion to sever as a "continuing" motion, but continued to deny it.

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[1] All of the codefendants were convicted and appealed their convictions; and petitioner is informed that Winders, Harris, and Edwards are also petitioning the Court for a writ of certiorari.

Petitioner and his codefendants moved fruitlessly for relief from the massive pretrial publicity, which had been occasioned by the defendants' prominence.[2] When trial began on January 19, 1977, the trial judge rejected challenges for cause based on pretrial publicity and refused a defense request that each juror be questioned as to his competency outside the presence of the rest of the panel. Consequently, the entire panel heard various prospective jurors state that they had already formed opinions that the defendants were guilty.

According to the government's evidence, defendant Roberts had borrowed heavily over the years from First Federal Savings and Loan Association of Durham, North Carolina. During a period of some fifteen months in the years 1973 and 1974, several real estate loans had been made by First Federal to named borrowers who were associates or relatives of Roberts; but the proceeds of the loans had been disbursed to Roberts or for his benefit. Generally Roberts had caused the conveyance to the named borrowers of the real estate which was to secure their loans.

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[2] In September and October 1976 six other persons in Durham, North Carolina had been tried and convicted in federal court on charges relating to two other savings and loan associations in Durham, North Carolina. Many press reports lumped together all of the "Durham 11".

Defendants Edwards and Harris were prosecuted because as officers of First Federal they had approved loans naming other borrowers, when they knew Roberts would receive the money. Petitioner Holleman and codefendant Winders were indicted because they had certified from their examination of public records that the various First Federal loans to the named borrowers were secured by a first lien and had participated in the disbursement of some loan proceeds.

Petitioner is an attorney engaged in private practice, but was also listed by First Federal as its "general counsel". However, he was not invited to meetings of the association's board of directors, nor was he involved in making or approving loans, nor did he have access to loan files. He did not participate in closing any loans[3]; and all loans were closed solely by First Federal employees at the offices of First Federal. In some instances, the closing statements, prepared by First Federal employees, called for checks for a portion of the loan proceeds to be made payable to petitioner Holleman as "attorney" or "trustee". Some of these checks were indorsed by petitioner and delivered to defendant Roberts. This was done with the concurrence of the named borrowers, who were

[3] In its order denying the petition for rehearing, the Court of Appeals deleted the erroneous statement in its original opinion that petitioner and Winders had "closed loans". See A-5,9.

from the outset seeking to borrow funds that would be used by Roberts.

At the end of the government's evidence, petitioner moved for acquittal under Rule 29. This motion was granted as to the final count, which charged him with false entries in violation of 18 U.S.C. § 1006. Also, the trial court struck from count one of the indictment the allegation that defendants had conspired to defraud the United States of its right to have the laws administered honestly. In all other respects, petitioner's motion was denied, as were similar motions of the other defendants. Moreover, petitioner received no relief on his motion to dismiss the charges on grounds that the FBI agent who supervised the entire investigation had destroyed all of his rough interview notes.

The petitioner, whom the Grand Jury had indicted as "attorney" and "trustee" for First Federal, also moved unsuccessfully to have the government specify whether he was being prosecuted as an "officer, agent, or employee" of a savings and loan association -- the only category of persons to whom 18 U.S.C. §§ 657 and 1006 apply -- or instead was being prosecuted for aiding and abetting other persons who did fall in that category. In like manner, an instruction which petitioner requested to clarify this point was denied.

After the jury had been charged, it found all five defendants guilty of the conspiracy offense. Petitioner Holleman was found guilty on four counts of mis-

application of funds under 18 U.S.C. § 657 and not guilty on a fifth count. The other defendants were found guilty of the various charges against them, except that Winders was acquitted of one alleged misapplication.

Post-trial motions were submitted by petitioner and his codefendants but were denied. Judgments of conviction were entered as found by the jury on April 1, 1977. Petitioner received an active sentence of three years and a fine of $26,000. Thereafter, he instituted his appeal.

REASONS WHY THE COURT SHOULD GRANT THE WRIT

1. The Decision of the Court of Appeals as to the Circumstances Under Which a "Sham" Loan is Made in Violation of 18 U.S.C. § 657 Conflicts With the Decisions of Other Courts of Appeals on This Same Matter and Involves an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

In its short per curiam opinion the Court of Appeals referred to "sham" loans and in a footnote cited United States v. Gens, 493 F.2d 216 (1st Cir. 1974). However, Gens designates three types of "straw" loans -- none of which applies to the facts of the present case. By implication, the Court of Appeals for the First Circuit ruled that other loans were lawful, even though a named borrower might borrow funds for the use of

some other person. See also United States v. Docherty, 468 F.2d 989 (2nd Cir. 1972).

In United States v. Gallagaher, 576 F.2d 1028 (3rd Cir. 1978), a recent case to which the court below did not advert, the Court of Appeals for the Third Circuit adopted the analysis of Gens. Moreover, it reversed the convictions there for failure of the trial judge to grant a requested instruction based on Gens to the effect that, to constitute a "sham" loan, the named borrower must lack the ability or intent to repay. A similar instruction, requested by petitioner and his codefendants in the case at hand, was denied by the trial court, but the Court did not even discuss the refusal to instruct.

In the case at hand, the named borrowers expected that defendant Roberts, the developer for whose use they were borrowing funds, would repay the loans. (Had there been no recession in 1973-4, he might well have done so). However, these borrowers were also aware that, if Roberts did not repay and if the security proved inadequate, they had obligated themselves to repay the loans.[4] Under Gens and Docherty, such facts do not sustain a charge

[4]According to the evidence the alleged "straw man" in one of the loan transactions had a net worth of some $8,000,000.

of misapplication of the funds of the lending institution. Cf. United States v. Britton, 107 U.S. 655, 2 S.Ct. 512, 27 L.Ed. 520 (1882).

Under the rationale of those cases, after having borrowed funds and becoming liable for repayment of principal and interest, the named borrower is free to use the funds as he pleases; it has become his money.

The conflict between these decisions and the decision in the court below concerns an important issue which should be settled by this Court. There has been much discussion about what constitutes criminal misapplication under 18 U.S.C. § 657, which concerns federally-chartered or federally-insured savings and loan associations, and under its statutory twin, 18 U.S.C. § 656, which applies to national banks and federally-insured banks. Some of this discussion has concerned persons of considerable prominence in the nation's affairs. See Comptroller of the Currency, Inquiry into Certain Matters Relating to T. Bertram Lance and Various Financial Institutions (August 18, 1977).

Most Americans are unaware that, if they lend their credit to a relative or friend and seek to borrow money in their own name for the use of another person, they risk possible federal prosecution. If any criminal liability does exist in such a case, this Court should so announce.

Officials of financial institutions are unsure as to the legality of some traditional lending practices. If these traditional practices are criminal, then this Court should so decide. The question, about which conflict now exists among the Courts of Appeal, is of such importance that it should be settled by this Court.

2. In Upholding Petitioner's Conviction and Imposing an Absolute Criminal Liability for the Rendition of Routine Legal Services, the Decision of the Court of Appeals Was in Conflict With the Decision of Another Court of Appeals on the Same Matter and Also Was in Conflict With Applicable Decisions of This Court.

This Court has required mens rea for conviction of a felony. Even a mistake of law can negate felonious intent. Morissette v. United States, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952). Furthermore, in a criminal case involving fraudulent intent it is reversible error to refuse a requested instruction concerning good faith. United States v. Murdock, 290 U.S. 389, 54 S.Ct. 223, 78 L.Ed. 381 (1933).

Consistent with the mens rea requirement, the Court of Appeals for the Fifth Circuit ruled that an attorney was improperly convicted under 18 U.S.C. § 657 -- the statute principally involved in the case at hand -- for his rendition of certain legal services in connection with an

illegal loan by a savings and loan association. United States v. Musgrave, 444 F.2d 755 (5th Cir. 1971). The involvement of the defendant attorney in that case was much greater than any involvement of petitioner Holleman in the loan transactions, which gave rise to his indictment. Moreover, in Musgrave, the attorney, Bryant, apparently was aware that the security was inadequate, but petitioner Holleman had no such awareness and had no access to the loan files. In reversing Bryant's conviction, the Court of Appeals remarked:

> "Finally, under all of the circumstances extant, it seems clear that Bryant did nothing other than well serve his client by expeditiously closing the transaction".

This same observation would apply to petitioner Holleman.

The Musgrave case seems to be the only decision dealing with the liability of an attorney under 18 U.S.C. § 657 for rendering legal services in connection with a loan transaction which is later attacked as a "sham". Clearly that decision conflicts with the decision of the court below, which neither cited nor sought to distinguish Musgrave.

The issue is an important one. Unlike Bryant, the attorney in Musgrave, petitioner did not close

any loans[5]. He only rendered routine legal services of title examination--services of a sort which were rendered from time to time by some 30 to 40 attorneys who were on First Federal's list of approved attorneys.

In the post-Watergate era lawyers are under attack from many quarters. Sometimes efforts are made to punish them merely for giving honest advice to their clients. See Maness v. Meyers, 419 U.S. 449, 466, 95 S.Ct. 584, 42 L. Ed. 2d 574 (1975). In the case at hand, the federal government seeks to impose severe punishment on petitioner by imputing to him the knowledge and intent of the clients for whom he rendered routine legal services.

It must be remembered that petitioner was rendering legal services because he was one of the 30 to 40 attorneys whom First Federal had approved to conduct title examinations for its borrowers. Petitioner's services were paid for by the borrower. Under the ethics opinions of the North Carolina State Bar, petitioner did not become attorney for the lending institution in connection with these loan transactions; and his primary obligation was to the borrower. See

[5] In its original opinion the Court of Appeals stated that Holleman and Winders had closed loans. In its order denying the petition for rehearing, the Court of Appeals deleted this erroneous statement.

CPR 136, dated October 27, 1977 (N.C. Bar, Vol. 24, #4, p. 27). Cf. CPR 137, dated October 27, 1977 (N.C. Bar, Vol. 24 #4, p. 27); Report of Special Committee on Real Estate Transactions, (N. C. State Bar, Vol. 24, #1, p. 9).

Whether a lawyer becomes criminally liable under these circumstances is a question of federal law that is important not only to the petitioner but to the legal profession generally. It should be settled by this Court.

3. In Upholding the Denial of Petitioner's Continuing Motion for Severance, the Decision of the Court Below Was in Conflict with the Decision of Another Court of Appeals on the Same Matter and with Applicable Decisions of this Court.

Petitioner was charged in far fewer counts than codefendants Edwards, Harris, and Roberts. Also, as was recognized even by the per curiam opinion of the court below, his role in the alleged conspiracy and in the loans was peripheral. Therefore, he made a continuing motion to sever his case for trial.

This Court has revealed its concern with the danger of "transference of guilt: in conspiracy cases, like that at bar. Kotteakos v. United States, 328 U.S. 750, 66 S. Ct. 1239, 90 L.Ed. 1557(1946). For the case at bar, this danger was heightened by massive pretrial publicity, which, as documented in connection with a pretrial motion for continuance, had focused

on the mammoth operations of defendant Roberts, the developer who had received the loan proceeds and who later had gone into bankruptcy.

In United States v. Mardian, 546 F.2d 973(D.C.Cir. 1976), the Court of Appeals for the District of Columbia held that the trial court should have granted a severance to Robert C. Mardian, a lawyer who was charged with participating in the Watergate conspiracy. Like petitioner here, Mardian's involvement in a conspiracy with highly publicized codefendants had only been peripheral. The case makes clear that a trial judge has a continuing duty to consider a motion for severance in light of additional developments prior to and during the trial.

A few days before petitioner's trial, an additional indictment was obtained against petitioner's codefendants with respect to a different loan transaction.

This indictment generated new publicity and thereby dissipated the benefits of the delay that had occurred between the original indictment and the commencement of trial. Thus, the danger of "transference of guilt" was increased by the joint trial of petitioner with codefendants who had been charged in a publicized additional indictment a few days before trial commenced.

There is still another dimension to the question presented. By denying petitioner's motion to sever,

the court made it impossible for petitioner to call his codefendants as witnesses in his behalf. In a joint trial, one codefendant cannot call another as a witness! The codefendants, whom petitioner could not call himself, declined to testify in their own behalf on the stated ground that, if they testified, they might incriminate themselves as to the other indictment that was pending.

This Court has stated: "The right to the production of all evidence at a criminal trial similarly has constitutional dimensions. The Sixth Amendment explicitly confers upon every defendant in a criminal trial the right 'to be confronted with the witnesses against him' and 'to have compulsory process for obtaining witnesses in his favor.' Moreover, the Fifth Amendment also guarantees that no person shall be deprived of liberty without due process of law. It is the manifest duty of the courts to vindicate those guarantees, and to accomplish that it is essential that all relevant and admissible evidence be produced." United States v. Nixon 418 U.S. 683, 711, 94 S.Ct. 3090, 41 L.Ed. 2d, 1039, 1066(1974).

While a severance of petitioner's trial might have been less convenient for the government, the denial of the severance impaired petitioner's right to the production of all evidence at his trial.

The decision of the court below conflicts with the decision of another Court of Appeals in United States v.

Mardian, supra. Even more important, it conflicts with the principles enunciated by this Court in Kotteakos v. United States, supra, and in United States v. Nixon, supra.

4. In Refusing to Distinguish Between the Theory on Which the Grand Jury Had Indicted Petitioner and that on Which He Was Being Tried by the Government, the Court Below Was in Conflict with Applicable Decisions of this Court, Which Uphold a Defendant's Right to be Indicted by a Grand Jury and to be Informed of the Nature and Cause of the Accusation against Him, and It Sanctioned Such a Departure from the Accepted and Usual Course of Judicial Proceedings by the Trial Court as to Call for Exercise of this Court's Power of Supervision. Both 18 U.S.C. § 657 and 18 U.S.C. § 1006 apply only to a special category of persons--namely, officers, agents or employees of federally-chartered or federally-insured savings and loan associations and of certain other institutions. The indictment charged petitioner Holleman as an "attorney" and "trustee" for First Federal Savings and Loan Association of Durham, North Carolina. Thus, the indictment clearly rested on the premise that petitioner came within that category of persons who are directly subject to the provisions of 18 U.S.C. §§ 657 and 1006. Government evidence established that petitioner had been listed as "general counsel" for First Federal, which also suggested that he was being prosecuted as an officer, agent, or employee of that lending institution.

However, when its evidence was all in, the government abandoned its efforts to convict petitioner as a principal and switched to a theory of aiding and abetting. In his closing argument the United States Attorney stated explicitly that petitioner was being prosecuted as an aider and abettor.

In view of the change in the government's theory, petitioner asked that, as to him, government be required to elect between prosecution on the theory of the grand jury indictment and prosecution as an aider and abettor. Such election was denied by the Court. Thereafter petitioner asked that the trial judge instruct the jury that he was not an officer, agent, or employee of First Federal within the purview of the applicable statutes. The requested instruction was denied, even though the evidence made clear that petitioner did not come within the category of persons who were directly subject to 18 U.S.C. §§ 657 and 1006 and even though the government itself had abandoned such a contention. Of course, whether the jury--to whom the indictment was read verbatim--rested its conviction of petitioner on the same false premise on which the grand jury had relied is unascertainable.

When the government obtains a grand jury indictment on one theory and then abandons it and seeks to convict on a different theory, there is

a threat to a defendant's constitutional rights to be held to answer for a serious crime only on the indictment or presentment of a grand jury and to be informed of the nature and cause of the accusation against him. In a unanimous opinion reversing the conviction in Stirone v. United States, 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960), the Court has made clear that the rights involved are substantial and that deprivation of these rights is not to be dismissed as harmless error. There it stated:

> "While there was a variance in the sense of a variation between pleading and proof, that variation here destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grant jury. Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error. Compare Berger v United States, 295 US 78, 79 L ed 1314, 55 S Ct 629. The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge. Thus the basic protection the grand jury was designed to

> afford is defeated by a device or method which subjects the defendant to prosecution for interference with interstate commerce which the grand jury did not charge."

When it upheld petitioner's conviction without any discussion of this question that had been raised, the Court of Appeals tacitly approved a procedure which conflicts with the rationale of Stirone. Cf. Russell v. United States, 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1942). Moreover, by failing to set aside a conviction which may have resulted from reliance by the jury on a false premise which the United States Attorney had explicitly abandoned and which was unsupported by the evidence, the Court of Appeals sanctioned such a departure from the usual course of judicial proceedings as to call for exercise of this Court's power of supervision.

5. In View of the Overwhelming Pretrial Publicity and the Specific Request that Prospective Jurors Be Examined as to Their Competency Outside the Hearing of the Rest of the Jury Panel, the Decision of the Court Below Sanctions Such a Departure by the Trial Court from the Accepted and Usual Course of Judicial Proceedings as to Call for Exercise of This Court's Power of Supervision.

The right to jury trial guarantees the criminally accused a fair trial by a panel of "impartial" jurors. The Court has evidenced its concern about the effect of pretrial publicity on juror impartiality. Irvin v. Dowd, 366 U.S. 717, 81 S. Ct. 1639, 6 L.Ed. 2d 751(1961). Moreover, the Court has exercised its supervisory power to reverse a conviction per curiam when it determined that the procedure used by the trial court did not protect the impartiality of the jury from taint by newspaper stories. Marshall v. United States, 360 U.S. 310, 79 S.Ct. 1171, 3 L. Ed.2d 1250 (1959).

Under the jury selection procedures used by the trial court, (a) defendants were not allowed to have a list of prospective jurors until jury selection began, (b) none of the defense counsel were allowed to question prospective jurors directly during the voir dire examination, (c) on challenges for cause any uncertainty was resolved in favor of retaining prospective jurors who had read about the case, and (d) additional peremptory challenges were denied to the

defendants. These other procedures heightened the prejudice that would have resulted in any event from the trial court's refusal of the defense request that each prospective juror be examined outside of the presence of other chosen or prospective jurors. The American Bar Association Standards Relating to the Administration of Criminal Justice recommend that, in selecting the jury:

> "Whenever there is believed to be a significant possibility that individual talesmen will be ineligible to serve because of exposure to potentially prejudicial material, the examination of each juror with respect to his exposure shall take place outside the presence of other chosen and prospective jurors. An accurate record of this examination shall be kept, by court reporter or tape recording whenever possible. The questioning shall be conducted for the purpose of determining what the prospective juror has read and heard about the case and how his exposure has affected his attitude towards the trial, not to convince him that he would be derelict in his duty if he could not cast aside any preconceptions he might have."
> Fair Trial and Free Press, Standard 3.4(a).

In United States v. Perrotta, 533 F.2d 247(1st Cir.1977), in reversing a conviction under similar circumstances, the First Circuit explained:

"While much discretion in dealing with incidents of this nature is vested in the trial judge, see United States v. Jones, 542 F.2d 186, 194 & n.9 (4th Cir. 1976), we agree with the Margoles court that once the court has actually determined that one or more of the jurors has been exposed to prejudicial publicity, its further investigation of the matter should be conducted on an individualized basis so that jurors will be encouraged to speak freely and will not repeat prejudicial information in one another's presence."
(United States v. Perrotta, 533 F2d at 250.)

This Court, in a celebrated case concerning the effects of all-pervasive publicity on jury impartiality, has stated:

"Given the pervasiveness of modern communications and the difficulty of erasing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. And appellate tribunals have the duty to make an independent evaluation of the circumstances." (Our emphasis)
Sheppard v. Maxwell, 384 U.S. 333, 362, 86 S.Ct. 1507, 16 L.Ed.2d 600, 620(1966)

The decision of the court below, in upholding petitioner's conviction in a criminal trial where the jury selection procedure used did not properly

safeguard against taint of the jury's impartiality is in conflict with the decisions of other Courts of Appeal and with the principles established by the applicable opinions of this Court. Furthermore, it sanctions a practice which departs so significantly from recognized standards of criminal justice administration and from the accepted and usual course of judicial proceedings that this Court should exercise its power of supervision here, as it did in Marshall v. United States, supra.

CONCLUSION

The trial of petitioner and his co-defendants lasted several weeks and involved voluminous exhibits. After pondering the appeal for almost nine months, the court below rendered a short per curiam opinion which attempted to bury the questions raised by not discussing them. However, these questions are of such a nature that this Court should now bring them back from a premature grave by granting the writ of certiorari.

The questions presented involve conflict between the decision of the court below and decisions of other Courts of Appeal; failure of the court below to follow the guidance of applicable opinions of this Court; and sanction by the court below of unfair procedures which should be curbed in the proper exercise of this court's power of supervision. These questions are important not only to petitioner, a respected 65-year-old attorney who never before had a blemish on his record, but also to anyone who is concerned that accused persons receive a fair trial. Therefore, we request this Court to grant this petition for the writ of certiorari.

Respectfully submitted,

Robinson O. Everett

James B. Craven III

Norman Williams

Attorneys for Petitioner
Robert D. Holleman

CERTIFICATE OF SERVICE

I certify that, pursuant to Supreme Court Rule 33, I have served the foregoing Petition for a Writ of Certiorari to the Court of Appeals for the Fourth Circuit by mailing three copies, first class postage prepaid, to the Solicitor General, Department of Justice, Washington, D. C., 20530, and three copies to the Honorable H. M. Michaux, Jr., United States Attorney, at his office address, Box 1858, Greensboro, North Carolina, 27402.

This 13th day of April, 1979.

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APPENDIX TO PETITION

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-1618

UNITED STATES OF AMERICA,

Appellee,

versus

ROBERT D. HOLLEMAN,

Appellant.

No. 77-1619

UNITED STATES OF AMERICA,

Appellee,

versus

WILLIAM W. EDWARDS,

Appellant.

No. 77-1620

UNITED STATES OF AMERICA,

Appellee,

versus

JOHN B. HARRIS,

Appellant.

No.. 77-1621

UNITED STATES OF AMERICA,

Appellee,

versus

WILLIAM R. WINDERS,

Appellant.

No. 77-1622

UNITED STATES OF AMERICA,

Appellee,

versus

BOBBY R. ROBERTS,

Appellant

Appeals from the United States District Court for the Middle District of North Carolina, at Durham. Robert E. Maxwell, District Judge.*

Argued May 4, 1978
Decided January 30, 1979.

* Chief Judge, United States District Court for the Northern District of West Virginia, sitting by designation.

Before HAYNSWORTH, Chief Judge, RUSSELL, Circuit Judge, and FIELD, Senior Circuit Judge.

Robinson O. Everett and James B. Craven, III (Everett, Everett, Creech & Craven on brief) for Appellant in 77-1618; L. P. McLendon, Jr. (J. T. Williams, Jr., George W. House, Brooks, Pierce, McLendon, Humphrey and Leonard on brief) for Appellant in 77-1619; William D. McCaffrey (Eugene W. Purdom, Jordan, Wright, Nichols, Caffrey and Hill on brief) for Appellant in 77-1620; James B. Maxwell (Richard M. Hutson, II, Mount, White, King, Hutson on brief) for Appellant in 77-1621; Jerry L. Jarvis (William H. Murdock, Murdock, Jarvis, LaBarre on brief) for Appellant in 77-1622; Allen Holt Gwyn, Jr., Assistant United States Attorney (H. M. Michaux, Jr., United States Attorney on brief) for Appellee in 77-1618 through 77-1622.

PER CURIAM:

On September 6, 1977, William D. Edwards, John B. Harris, Bobby R. Roberts, Robert D. Holleman, and William R. Winders were variously charged in an eighteen-count indictment returned by a grand jury for the Middle District of North Carolina. In Count One, all five defendants were charged under 18 U.S.C. § 371 with a conspiracy to misapply funds of First Federal Savings and Loan Association of Durham, North Carolina, a federally-insured savings and loan

association, and causing false entries and statements to be made in the records and reports of the Association in violation of 18 U.S.C. §§ 657 and 1006. The defendants, Edwards, Harris, and Roberts were charged with thirteen substantive counts of misapplication in violation of Section 657. The defendant Holleman was jointly charged in five of the misapplication counts, and the defendant Winders was charged in four of these counts. Edwards and Harris were also charged with three counts of making false entries in violation of 18 U.S.C. § 1006, and Holleman and Roberts were charged in Count Eighteen with a violation of Section 1006.[1] The jury returned verdicts of guilty as to all defendants on the conspiracy charge; found Edwards and Harris guilty of the sixteen substantive offenses; Roberts guilty of the thirteen substantive offenses; Holleman guilty of four of the substantive offenses and not guilty of one; and Winders guilty of three of the substantive offenses and not guilty of one. Convicted pursuant to the jury's verdicts, the five defendants have appealed.

The charges in the indictment grew out of loan transactions of the Association covering a period of some fifteen months in the years 1973 and 1974. During all of that time William W. Edwards was the President and a director of the

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1. This count was dismissed during the course of the trial.

Association, having served as its managing officer for some eighteen years prior to the indictment. John G. Harris was Secretary-Treasurer and a director of the Association; and he and Edwards, together with a third director, served as the Association's loan committee. Holleman and Winders, both of whom were attorneys, conducted title examinations, closed loans, and disbursed the proceeds thereof for the Association.

We have carefully reviewed the record, and in our opinion the evidence sufficiently established that during the period covered by the indictment Edwards and Harris caused the Association to make over four million dollars in "sham" loans,[2] the proceeds of which were applied to the defendant Roberts' interests and concealed the true nature of the loans from the Association's directors as well as the examiners of the Federal Home Loan Bank by disregarding the established procedures of the Association. While the attorneys, Winders and Holleman, were not the primary actors in the conspiracy, they were willing and knowing conduits of the funds which were passed along to Roberts, and participated in the concealment of the transactions in the records of the Association.

Perceiving no error in the conduct of the trial or in the instructions of

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2. See United States v. Gens, 493 F.2d 216 (1 Cir. 1974).

the court, and finding the evidence sufficient to support the jury's verdicts, we affirm the convictions.

A F F I R M E D.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 77-1618

UNITED STATES OF AMERICA,

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No. 77-1619

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WILLIAM R. WINDERS,

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No. 77-1622

UNITED STATES OF AMERICA,

Appellee,

versus

BOBBY R. ROBERTS,

Appellant.

Appeals from the United States District Court for the Middle District of North Carolina, at Durham. Robert E. Maxwell, Chief Judge, Northern District of West Virginia, sitting by designation.

ORDER

Upon consideration of the petition for rehearing, it is

ORDERED that the final sentence in the second paragraph on page three of the slip opinion is amended to read as follows: "Holleman and Winders, both of whom were attorneys, conducted title examinations and disbursed the proceeds of loans for the Association." The original opinion is reaffirmed in all other respects.

NOW, THEREFORE, with the concurrence of Chief Judge Haynsworth and Judge Russell, and no judge in active service having requested a poll upon the en banc suggestion, it is ADJUDGED and ORDERED that the petition for rehearing is denied.

(Signed)JOHN A. FIELD, JR.
Senior U. S. Circuit
Judge

March 12, 1979.

18 U.S.C. § 2 (1970):

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 371 (1970):

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C § 1006 (1976):

Whoever, being an officer, agent or employee of or connected in any capacity with the Reconstruction Finance Corporation, Federal Deposit Insurance Corporation, National Credit Union Administration, Farm Credit Administration, Department of Housing and Urban Development, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, or any land bank, intermediate credit bank, bank for co-operatives or any lending, mortgage, insurance, credit or savings and loan corporation or association authorized or acting under the laws of the United States or any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation or by the Administrator of the National Credit Union Administration, or any small business investment company, with intent to defraud any such institution or any other company, body politic or corporate, or any individual, or to deceive any officer, auditor, examiner or agent of any such institution or of department or agency of the United States, makes any false entry in any book, report or statement of or to any such institution, or without being duly authorized, draws any order or bill of exchange, makes any acceptance, or issues, puts forth or assigns any note, debenture, bond or other obligation, or draft, bill of exchange, mortgage, judgment, or decree or, with intent to defraud the United States or any agency

thereof, or any corporation, institution, or association referred to in this section, participates or shares in or receives directly or indirectly any money, profit, property, or benefits through any transaction, loan, commission, contract, or any other act of any such corporation, institution, or association, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Supreme Court, U. S.
FILED
JUN 15 1979
MICHAEL RODAK, JR., CLERK

Nos. 78-1567, 78-1568, 78-1569 and 78-1570

In the Supreme Court of the United States

OCTOBER TERM, 1978

ROBERT D. HOLLEMAN, PETITIONER

v.

UNITED STATES OF AMERICA

WILLIAM R. WINDERS, PETITIONER

v.

UNITED STATES OF AMERICA

WILLIAM W. EDWARDS, PETITIONER

v.

UNITED STATES OF AMERICA

JOHN B. HARRIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

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Department of Justice
Washington, D.C. 20530

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1567

ROBERT D. HOLLEMAN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 78-1568

WILLIAM R. WINDERS, PETITIONER

v.

UNITED STATES OF AMERICA

No. 78-1569

WILLIAM W. EDWARDS, PETITIONER

v.

UNITED STATES OF AMERICA

No. 78-1570

JOHN B. HARRIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Winders Pet. App. A) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 1979. Petitions for rehearing were denied on March 14, 1979. The petitions for a writ of certiorari were filed on April 13, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the trial court correctly instructed the jury on the elements of the offense of misapplication

of the funds of a savings and loan association, 18 U.S.C. 657.

2. Whether the evidence was sufficient to support the convictions of petitioners Holleman and Winders.

3. Whether the trial court erred in denying motions to sever made by petitioners Holleman and Winders.

4. Whether the voir dire questioning of the jury panel was proper.

5. Whether the government's bringing of subsequent charges against petitioner Harris was improper.

STATEMENT

Following a jury trial in the United States District Court for the Middle District of North Carolina, petitioners Edwards and Harris were convicted on 13 counts of misapplying the funds of a federally insured savings and loan association, in violation of 18 U.S.C. 657; three counts of making false entries in the records of that association, in violation of 18 U.S.C. 1006; and one count of conspiracy, in violation of 18 U.S.C. 371. Petitioner Holleman was convicted on one count of conspiracy and four counts of misapplication of funds, and petitioner Winders was convicted on one count of conspiracy and three counts of misapplication of funds (Winders Pet. App. A-3 to A-4).[1]

Petitioners Edwards and Harris were each sentenced to five years' imprisonment and a fine of

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[1] Petitioners Holleman and Winders were each acquitted on one count of misapplication of funds.

$58,000 (A. 106, 108).[2] Petitioner Holleman was sentenced to three years' imprisonment and a fine of $26,000 (A. 109). Petitioner Winders was sentenced to three years' imprisonment and a fine of $22,000 (A. 110).[3] The court of appeals affirmed the convictions of all four petitioners (Winders Pet. App. A).

The evidence at trial showed that petitioners were involved in a scheme whereby co-defendant Bobby Roberts, a real estate developer, secured money from the First Federal Savings and Loan Association of Durham, North Carolina, through sham loan transactions. Petitioner Edwards was the president and a director of the loan association. Petitioner Harris was the secretary-treasurer and also a director of the association. Petitioners Holleman and Winders were attorneys involved in several of the loan transactions.

During the period in which the scheme was in operation, First Federal had outstanding loans to Bobby Roberts in an amount approaching the association's lending limit to any one party (Tr. 2015-2016, 2152). In order to obtain funds, therefore, Roberts applied for loans in 13 separate transactions using various friends, relatives, associates, and employees as the named borrowers (Tr. 768, 859, 874,

[2] "A." refers to the Joint Appendix of Appellants in the court of appeals.

[3] Co-defendant Bobby Roberts was convicted on one count of conspiracy and 13 counts of misapplication of funds. He was sentenced to five years' imprisonment and a fine of $49,000 (A. 107).

1349, 1493-1495, 1780-1783). Petitioners Harris and Edwards approved and arranged for these loans in a manner that violated numerous established bank procedures (Tr. 770-809). Often, the loans were for amounts far greater than the appraised value of the underlying security (Tr. 828, 2280-2282, 2292-2294). The named borrowers received no benefit from the loans and did not expect to have to repay them; in five out of seven cases the named borrower was financially unable to repay the loan (Tr. 874-878, 891, 1360-1366, 1432-1433, 1751, 1762, 1781-1784). The proceeds of several of the loans were distributed through checks made out to "Holleman, Trustee" or "Winders, Trustee"—a procedure used by the bank only in the case of the Roberts loans—and the money was thereafter given to Roberts by Holleman or Winders (Tr. 528, 615-616, 757-758, 777-778, 837, 2258-2267).

ARGUMENT

1. Petitioners contend (Holleman Pet. 10-13; Edwards Pet. 5-19; Harris Pet 8-23) that the trial court failed properly to instruct the jury as to the elements of the offense of misapplication of funds under 18 U.S.C. 657. They claim that as a result of the court's instructions, the jury may have convicted them for nothing more than a violation of the association's technical regulations. A conviction based on such a construction of the statute, they contend, would be contrary to the decision of this Court in *United*

States v. *Britton*, 107 U.S. 655 (1882). This contention is not supported by the record.

The trial court gave extensive instructions regarding the intent required to support a conviction under Section 657 (Tr. 2729-2735). Specifically, the court instructed (*id.* at 2729, 2731-2732):

> The fourth essential element is that in each of these counts that each of the defendants acted knowingly and willfully with intent to injure and defraud the savings and loan association.
>
> * * * * *
>
> However, the term "willfully misapply" means a criminal misapplication rather than a mere act of maladministration or a mere exercise of bad judgment, or in the misuse of the association's monies, funds, and credits. In order for there to be a willful misapplication, the defendants must convert the association's monies, funds or credits to the use, benefit, or gain of one or more of the defendants or to some other person's or company's use, benefit, or gain.
>
> In addition to such an unauthorized or unlawful appropriat[ion] of the association's monies, funds, credits, assets, or securities, the act must have been done knowingly and willfully with the specific intent to injure or defraud the association.[4]

[4] The portion of the instruction quoted by petitioners Harris and Edwards (Harris Pet. 12-13; Edwards Pet. 9-10) was given in the context of an attempt by the court to define the effect of any consent or authorization by the board of directors (Tr. 2732-2733) and was not a direct instruction on intent.

The court therefore made it clear that mere bad judgment would not sustain a conviction under this statute. Nor could petitioners be convicted, under the instruction given by the court, merely on a finding that they made loans to the named borrower knowing the proceeds would be turned over to someone else, as in *United States* v. *Gens*, 493 F.2d 216 (1st Cir. 1974), and *United States* v. *Gallagher*, 576 F.2d 1028 (3d Cir. 1978), cited by petitioners. Instead, the court expressly stated that a specific intent to injure or defraud the loan association was necessary in order to support a conviction. The instruction fully met the standard set out in *United States* v. *Britton*, *supra*, 107 U.S. at 668-669. Because the court properly instructed the jury on the intent element, it was under no further requirement to use the language suggested by petitioners. *See United States* v. *Southers*, 583 F.2d 1302, 1306-1307 (5th Cir. 1978); *United States* v. *Dreitzler*, 577 F.2d 539, 549 (9th Cir. 1978).

2. Petitioners Holleman and Winders contend (Holleman Pet. 13-16; Winders Pet. 12-20) that the evidence was insufficient to support their convictions. This claim is insubstantial.

Both petitioners were convicted on the conspiracy count and as aiders and abettors on several substantive counts.[5] As the court of appeals concluded

[5] Petitioner Holleman to the contrary notwithstanding (Pet. 20-23), it is permissible to convict a defendant as an aider and abettor even though he was charged as a principal. *United States* v. *Longoria*, 569 F.2d 422 (5th Cir. 1978);

(Winders Pet. App. A-5), there was ample evidence from which the jury could have concluded that the attorneys "were willing and knowing conduits of the funds which were passed along to Roberts, and participated in the concealment of the transactions in the records of the Association."

The evidence showed that on several occasions the proceeds from the loans were delivered in checks made out to "Winders, Trustee" or "Holleman, Trustee," an unusual procedure employed by the bank only with these straw loans. Petitioners Winders and Holleman would then deliver the proceeds to Bobby Roberts rather than to the named borrower (Tr. 615-616, 757-758, 777-778, 837, 2258-2267). On several occasions bank officials, after receiving the loan application, asked Holleman or Winders to conduct a title search. The certificates were then prepared with such unusual speed as to indicate that the attorneys had prior knowledge of the intended transaction (Tr. 806, 1307-1308). Petitioner Winders was found to have submitted an inaccurate title certificate in connection with the first of these straw loans, and petitioner Holleman did the same in connection with one of the later loans (Tr. 622-626, 1317-1318, 2264-2265, 2292-2298). Petitioner Holleman failed to submit chain of title information as required by the bank on two of the loans; the effect of this failure was to conceal Bobby Roberts' interest in the property (Exhs. 8, 9, 12; Tr. 1285-1286). Finally, a check for $1,500, promised to one of the named borrowers as payment for the use of his name, was mailed from petitioner Holleman's office (Tr. 1784). This loan was made and the check mailed after the bank's board of directors, at a meeting attended by Holleman, had voted not to extend any additional loans to Bobby Roberts or any persons with related interests (Tr. 1550-1552). Accordingly, the evidence was sufficient to support the jury's conclusion that petitioners had intentionally participated in the fraudulent schemes.[6]

3. Petitioners Holleman and Winders contend (Holleman Pet. 16-19; Winders Pet. 9-12) that the court erred in denying their motions for severance. This is an essentially factual question and thus one not appropriate for certiorari. In any event, the evidence shows that the trial court acted well within its discretion in denying these motions. Of 18 counts, petitioner Holleman was charged in six and was involved in the transaction that was the subject of a seventh count. Additionally, two of the false entry

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United States v. *Thomas*, 469 F.2d 145 (8th Cir. 1972), cert. denied, 410 U.S. 957 (1973). See *Nye & Nissen* v. *United States*, 336 U.S. 613 (1949). *Stirone* v. *United States*, 361 U.S. 212 (1960), cited by petitioner, involved the possibility that the defendant was convicted of an offense completely different from that charged by the grand jury and is therefore inapposite to the instant case.

[6] Petitioner Winders' claim (Pet. 16-20) that the money belonged to the borrower and not to the bank at the time he handled it is frivolous. The evidence establishes his involvement in the conspiracy and his willful participation as an aider and abettor in the substantive offenses. The point at which he actually touched the money is irrelevant.

counts related to transactions in which he had participated. Petitioner Winders was charged in five counts, and one of the false entry counts related to the charges against him. Moreover, both petitioners were charged with conspiracy. Testimony as to the other offenses that was relevant to prove the conspiracy would therefore have been admissible against each of them even if their cases had been severed. *Lutwak* v. *United States*, 344 U.S. 604 (1953). Neither petitioner identified particular pieces of evidence especially damaging to him that the jury could not have heard had his trial been severed.

Petitioner Holleman argues that the joint trial denied him the right to call his co-defendants as witnesses. He makes no concrete showing of the testimony that his co-defendants would have given in his behalf and cites no cases indicating that his circumstances and the showing he made would entitle him to a severance on this ground. In fact, absent a specific showing that such witnesses have unconditionally offered to testify, a court does not abuse its discretion in denying a severance request in such cases. *United States* v. *Becker*, 585 F.2d 703, 706 (4th Cir. 1978); *United States* v. *Gay*, 567 F.2d 916 (9th Cir.), cert. denied, 435 U.S. 999 (1978).

Finally, the extent of petitioners' participation in the unlawful scheme serves to distinguish this case from *United States* v. *Mardian*, 546 F.2d 973 (D.C. Cir. 1976), and *United States* v. *Kelly*, 349 F.2d 720 (2d Cir. 1965), relied on by petitioners. In those

cases, the role played by the defendant in the overall scheme was deemed to be so minimal that the joint trial clearly resulted in prejudice to the defendant. Here, by contrast, petitioners Holleman and Winders played significant roles in the scheme, and there is no showing that they were prejudiced by "spill-over" evidence relating solely to more culpable defendants. Indeed, the jury demonstrated its ability to distinguish between separate offenses by acquitting each of these two petitioners on one count of misapplication of funds (page 3, *supra*).

4. Petitioners next argue (Holleman Pet. 24-27; Edwards Pet. 20-24; Harris Pet. 23-27) that the voir dire questioning of the jury panel was conducted improperly and that pretrial publicity had prejudiced their case.

The trial was held in Durham, North Carolina, at petitioners' request. Of the 12 impaneled jurors and the two alternates, none knew any of the facts of the case, and only two had heard or seen anything about the case. One of the jurors had heard of the case on the radio, and another had read of the upcoming trial in the newspaper, but the court's inquiry established that neither had any knowledge of the facts and that neither had formed any opinion as to the guilt or innocence of the defendants (Tr. 32, 122).

The record shows that the jurors were adequately questioned by the trial court in order to ascertain if there was any prejudice against petitioners as a result of the publicity. Although the questioning was done with all the jurors present, the court is not

required to proceed otherwise unless it finds a likelihood of substantial prejudice. *United States* v. *Jones*, 542 F.2d 186, 194-195 (4th Cir.), cert. denied, 426 U.S. 922 (1976). The individualized procedure is used to prevent the other jurors from hearing prejudicial information. *United States* v. *Perrotta*, 553 F.2d 247 (1st Cir. 1977). In this case, although one of the prospective jurors expressed his inability to accord the defendants the presumption of innocence, he did so in highly general terms without revealing any prejudicial information to the other jurors (Tr. 95).[7] Petitioners have pointed to no other basis for their claim of prejudice, and they have therefore failed to establish that the trial court abused its discretion in conducting the voir dire examination as it did.

5. Petitioner Harris contends (Pet. 5-8) that the government behaved improperly with respect to charges that were brought against him following the filing of the indictment in this case. He claims that after he had entered a plea of not guilty to the charges in this case the government threatened to bring another charge against him. This threat was made, according to petitioner, in an effort to force him to plead guilty in this case. In addition, petitioner contends that the government improperly introduced the facts underlying the subsequent charge as a similar act in the trial of this case.

[7] That juror was excused for cause.

Petitioner's assertions of governmental impropriety are unfounded. The original indictment was handed down in September 1976. Subsequently, evidence of an additional, similar sham loan transaction was uncovered. The investigation of the additional unlawful loan was completed in early December and an indictment charging that violation was returned in January (S.A. 2).[8] There is nothing in the record to support the suggestion that the additional charge was brought in retaliation for petitioner's plea of not guilty. Instead, it was a legitimate charge brought subsequent to the original indictment only because the offense was discovered after the first indictment had been filed.[9] Accordingly, any reference to the later charge in subsequent plea negotiations would have been entirely proper. *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978).

Evidence of the additional loan transaction was admitted at petitioner's trial on the initial charges as a similar transaction showing knowledge and intent and as evidence of the conspiracy. Petitioner does not challenge the admissibility of this evidence, but he claims that it impaired his right to testify in his own behalf because he feared that his testimony would be used against him in a subsequent trial. The right to testify in one's own behalf, however, does not include the right to immunity from prosecution

[8] "S.A." refers to the Supplemental Appendix of Appellee in the court of appeals.

[9] The charge was not tried in this case.

for other crimes committed. Evidence of similar acts admitted under Rule 404(b) of the Federal Rules of Evidence often involves conduct that has been or could be subject to prosecution in its own right. The fact that the conduct is the subject of a pending indictment neither renders the evidence inadmissible nor constitutes improper conduct on the part of the government.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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No. 78-1567

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

ROBERT D. HOLLEMAN,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

REPLY OF PETITIONER TO BRIEF FOR THE RESPONDENT IN OPPOSITION

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Barely a month ago, the Court decided the case of Jackson v. Virginia, ____ U.S. ____, 47 L.W. 4883 (June 28, 1979), a habeas corpus appeal from the Fourth Circuit on behalf of a state prisoner in Virginia. Citing In Re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), the Court went beyond Thompson v. Louisville, 326 U.S. 199, 80 S.Ct. 624, 4 L.Ed. 2d 654 (1960) and held that a federal

habeas corpus court must consider not whether there was any evidence to support a state-court conviction, but whether there was sufficient evidence to justify a rational trier of fact to find guilt beyond a reasonable doubt. Now clearly the Court in Jackson v. Virginia was concerned solely with a state habeas corpus case, but we believe that much of what Mr. Justice Stewart said for the Court there can readily be applied to the case at hand. Sure a reasonable doubt instruction was given here. Was it sufficient protection under the Winship and Thompson standards? Clearly not. Must the petitioner wait and bring a separate action under 28 USC 2255 to obtain relief? We would hope not.

The Solicitor General argues, at page 7 of his brief that the petitioner Holleman and his co-defendants could not, under the District Court's instructions, have been convicted "merely on a finding that they made loans to the named borrower knowing the proceeds would be turned over to someone else", as in United States v. Gens, 493, F.2d 216 (1st Cir. 1974) and United States v. Gallagher, 576 F.2d 1028 (3rd Cir. 1978). Not so. When the instructions given by the District Court are considered, and those requested by counsel and denied are also considered, this contention of the Government evaporates, certainly with respect to the two lawyer-defendants, Holleman and Winders.

Did the lawyers know of an intent not to repay, or that the named borrowers did not consider themselves responsible to

repay or had no ability to repay? Even if the other defendants had the sort of intent or knowledge that met the text of the First Circuit in Gens, that can hardly be imputed to the lawyer-defendants, whose role was throughout a very limited and entirely proper one. The Third Circuit opinion in Gallagher, supra, reinforces the basic intra-circuit conflict in this area, a conflict which can only, sooner or later, be resolved in this Court. It cannot be permanently postponed, for coming behind this case are others, e.g. United States v. Bert Lance, now pending in the Northern District of Georgia.

Footnote 5, at page 7 of the Solicitor General's brief, misses the whole point of the argument for the petitioner Holleman. Certainly a defendant can be convicted as an aider and abettor even though charged as a principal. Here however, conviction as a principal requires that a defendant be among a special category of people. Specifically, he must have been an officer, agent or employee of a federally insured savings and loan association. Holleman was the general counsel of First Federal Savings and Loan here, though it was a title only, without salary or other compensation. The indictment purported to be charging him in that capacity, almost as though he were house counsel. The problem here, and a rather acute one in terms of the future of the petitioner Holleman, is one of variance and failure to give notice, and the Government's brief is not responsive on these points.

The Solicitor General, at pages 8-9 of his brief, substitutes innuendo for argument. The factor of "unusual speed" is the exact argument specifically repudiated by the Fifth Circuit in United States v. Musgrave, 444 F.2d 755 (5th Cir. 1971). The argument here shows how the Government persists in viewing as sinister and criminal acts which are perfectly innocent according to the view of the Fifth Circuit in Musgrave. Clearly the Government is bothered and embarrassed by Musgrave. We are too, for unless this Court intervenes, we shall have to explain to our client why he must surrender his law license and go to prison when the lawyer-defendant (Bryant) in Musgrave went home from his trial and practiced law. There is simply no rational explanation for this.

It should also be noted that the loans in which the petitioner Holleman was involved were the first development loans made by First Federal in Durham. Since the type of loan was different, it is hardly surprising that the disbursement procedures should be different too, but not so "unusual" as the Solicitor General has suggested to the Court.

Finally, we cannot agree with the Solicitor General (pages 9-10 of his brief) that the severance issue was a factual one, inappropriate for certiorari nor that the cases of United States v. Mardian, 546 F.2d 973 (D.C. Cir. 1976) and United States v. Kelly, 349 F.2d 720 (2d Cir. 1965) are distinguishable. They could hardly be more on point.

CONCLUSION

It is respectfully submitted that the petition for certiorari should be granted.

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CERTIFICATE OF SERVICE

I have this day mailed two copies of this reply brief to the Solicitor General at his office address in Washington.

This 3rd day of August, 1979.

James B. Craven III
James B. Craven III

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